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Bakke v. Board of Regents - Foreword

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SYMPOSIUM: *BAKKE v. BOARD OF REGENTS*

Foreword

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The law, in its majestic equality, forbids all men to sleep under bridges, to beg in the streets, and to steal bread—the rich as well as the poor. Anatole France

As Anatole France suggests, equality is an elusive concept. If society were determined to treat all equally, a great deal of redistribution would have to take place. New employment opportunities and new places to live would be but a beginning. Perhaps, as the Declaration of Independence asserts, "all men are created equal," but once they assume their place in society, people are subjected to great disparities depending on parental wealth, race, exposure to education and a variety of other factors.

Some of the inequality of position in which any person finds himself or herself is self-made. It depends on how hard one worked at school, how eagerly one accepted responsibility at work, how prudently one invested one's money and so forth. A large part of the inequality, however, depends on factors beyond a person's control. Such social disabilities as not speaking English, not having had adequate educational opportunities, having parents who were deprived of intellectual opportunities and so cannot help their children find them, and, even more particularly, having been the victim of overt racism or ethnic bias, are group rather than self-imposed burdens.

Society inflicts burdens in many ways. Often it does so indirectly by providing an advantage to some. For example, when it builds good schools in wealthy suburbs or subsidizes home construction for Caucasians, that burdens disadvantaged groups deprived of those resources. Sometimes it does so directly—as when, at an earlier time, this country approved slavery (as it presently approves cheap migrant labor in some states). The direct burden of enslavement on specific individuals simultaneously provided advantage (cheap labor) to society

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and disadvantage to the affected individuals. It continued for generations to provide advantage to those who benefited from the effects of that labor. It continued to provide disadvantage to the children and children's children of those who were burdened and who passed on an impoverished inheritance.

Courts protect against only a small portion of such burdens. They seem set against accepting the claims of descendants of discrimination against descendants of those who benefited,[1] for example. The principal legal tool available for what redress exists is the equal protection clause.[2]

Equal protection appears designed only to prevent the political process from favoring one group at the cost of another. More realistically, it is designed to prevent the majority from taking political advantage of racial minorities,[3] since equal protection cannot be equally applied to all classes. The *Bakke* case[4] is itself an excellent illustration of that point. The medical school of the University of California at Davis preferred applicants from some geographic locations to applicants from others. It preferred persons planning to practice in certain fields of medicine over others.[5] Yet neither of these preferences (nor any of the many others) appeared to anyone to be suspect. And that, of course, is right. All classifications discriminate. For example, the tax system is preferentially discriminatory as to those who make less money and adversely discriminatory as to those who make more. Penal laws discriminate between those who are drunk in public and those who are drunk in the privacy of their homes.[6] The placement of a new courthouse allows some people ready access and makes others travel a great distance. A city may decide to prohibit advertising on some but not all trucks.[7] Courts cannot and should not attempt to make such laws equally beneficial or equally burdensome to everyone. Instead, they should and have distinguished certain types of rights and certain categories of claimants as more ap-

1. Milliken v. Bradley, 418 U.S. 717 (1974); Keyes v. School Dist., 413 U.S. 189 (1973).

2. The Slaughter-House Cases, 83 U.S. 36 (1872); Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955) [hereinafter cited as Bickel].

3. Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562, 2567 (1976); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

4. Bakke v. Regents of the University of California, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976).

5. *Id.* at 42, 553 P.2d at 1157-58, 132 Cal. Rptr. at 685-86.

6. Powell v. Texas, 392 U.S. 514 (1968).

7. Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).

propriate objects of their concern than others.[8]

Historically race has been considered an appropriate area of judicial concern.[9] Originally, the race in question was, of course, black.[10] Ample reason existed for singling out blacks for special court solicitude. Even more reason exists when one considers the present reluctance of courts to redress historic injury.[11] The California Supreme Court singled out Caucasians for similar treatment. The articles in this symposium principally address the question of whether that selection was appropriate.

Professor Morris shows that the court in *Bakke* reached its conclusion on the basis of a very inadequate record. Although the majority spoke of a program that might retain Third World presence in professional education, it examined no evidence to contradict the claim of the defendants that the special admissions program was the only available vehicle for minority professional education. He points out that the court accepted, arguendo, that the state might have a compelling interest in minority education but simply never reached the question of whether any alternative method of minority education was feasible. At the least, as that portion of his article suggests, the *Bakke* record is insufficiently complete to allow the United States Supreme Court to use it as a basis for restricting special admissions programs.

One of the questions that the record in *Bakke* leaves untouched is the question of the qualification of specially admitted students. The majority opinion recognizes that present admissions processes are not so sacrosanct that they must be used to the exclusion of somewhat more subjective criteria such as interviews and recommendations. It is important however to note that, at a time when the ratio of applicants to places in professional schools is so great, it is virtually certain that a large number of well-qualified applicants are turned away by all schools every year. Thus, it seems to me proper to view the admissions process as one of selecting from among a large number of qualified applicants those that best meet the academic objectives of the school. Many conceive of special admissions

8. Graham v. Richardson, 403 U.S. 365 (1971); Shapiro v. Thompson, 394 U.S. 618 (1969); Brown v. Board of Educ., 347 U.S. 483 (1954).

9. Korematsu v. United States, 323 U.S. 214 (1944).

10. The Civil Rights Cases, 109 U.S. 3 (1883).

11. Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562, 2567 (1976); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

as "lowering standards." Yet until we know a good deal more about how to measure professional success, it appears extremely improbable that one can select—solely on the basis of formal credentials—those applicants who will be the best doctors or the best lawyers.[12] If that is correct, is that not relevant to a resolution of the constitutional question? Does not the use of race as a selective criterion for admitting Third World students become less constitutionally troublesome if other measures for selection are found to be imperfect and if those specially selected are at least "qualified" in the traditional sense?

Professor Sedler points out that while the courts have purported to apply a strict scrutiny or compelling state interest test to racial classifications, in fact they have not had to do so. The successful cases of racial discrimination are cases which would have been resolved as they were by the application of the contemporary rational relationship test when it is applied in the field of human rights. Further, he reminds us that the fourteenth amendment was passed as part of a trilogy of amendments. Professor Sedler suggests that the thirteenth amendment, which bars badges of slavery, provides a balancing factor for the interpretation of the fourteenth. Further, he observes that the California Supreme Court was advancing consistency rather than rational social policy in its decision in *Bakke*.

Mr. Galloway and Mr. Hewitt carefully retrace the steps which led to the strict scrutiny test. They point to the concern of the Court in *Carolene Products*[13] that equal protection has special application to the politically impotent and conclude that, while the strict scrutiny test might appropriately apply to minority groups, it cannot be applied as the Supreme Court of California applied it to benefit whites.

In addition to the comments made by the three authors, with whom I agree, it seems to me worth noting that *Carolene Products* might lead to a reversal of the California Supreme

12. *See, e.g.*, the articles cited by the *Bakke* dissent (18 Cal. 3d at 84 nn.13-14, 553 P.2d at 1186 nn.13-14, 132 Cal. Rptr. at 714 nn.13-14): D. HOYT, THE RELATIONSHIP BETWEEN COLLEGE GRADES AND ADULT ACHIEVEMENT 30 (1963); Gough, *Evaluation of Performance in Medical Training*, 39 J. MED. ED. 679 (1964); Haley & Lerner, *The Characteristics and Performance of Medical Students During Preclinical Training*, 47 J. MED. ED. 446 (1972); Price, *Measurement of Physician Performance*, 39 J. MED. ED. 203, 211 (1964); Rhoades, *Motivation, Medical School Admissions and Student Performance*, 49 J. MED. ED. 1119, 1125 (1974); Turner, *Predictors of Clinical Performance*, 49 J. MED. ED. 338 (1974).

13. United States v. Carolene Prods. Co., 304 U.S. 144 (1938).

Court for yet another reason. As Professor Galloway and Mr. Hewitt note, the *Carolene Products* standard for strict scrutiny is political impotence. As their article also points out, that portion of the *Carolene Products* rationale has survived.[14] Bakke's claim is premised on what was probably always an overstatement: that *all* racial classifications require strict scrutiny. Only that racial classification which classifies minority groups to their disadvantage requires strict scrutiny.[15]

Accepting, however, the broader formulation which survived, it seems possible now to argue that race is no longer a suspect classification whether the classification pertains to minorities or to whites. To be sure, when the fourteenth amendment was ratified, blacks needed special protection against majoritarian society and had only limited political influence.[16] It is still true that blacks (and for that matter all Third World people) are a minority of society. Being a minority should not, however, suffice for strict scrutiny. Most pieces of legislation create minorities who are treated more harshly than are majoritarian interests under the statute. The question for them, and, I submit, for Third World people, is whether the political disadvantage represented at any given point is necessarily indicative of how they will be treated in other respects.[17] If any of the minorities (including now the Third World minorities) can count on a coalition of their own membership and

14. Massachusetts Bd. of Retirement v. Murgia, 96 S. Ct. 2562, 2567 (1976); San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973); Frontiero v. Richardson, 411 U.S. 677 (1973).

15. *See, e.g.*, Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723 (1974).

16. *See, e.g.*, The Civil Rights Cases, 109 U.S. 3 (1883); Bickel, *supra* note 3.

17. Justice Mosk notes that the assumption that the "white" race is not in need of the constitutional protection afforded by the fourteenth amendment is a misconception. Bakke v. Regents of the University of California, 18 Cal. 3d at 50 n.16, 553 P.2d at 1163 n.16, 132 Cal. Rptr. at 691 n.16. "Whites" in fact do not constitute a monolithic political force. Politically, the majority at any one time is made up of a number of pluralistic groups engaged in a temporary alliance for a given purpose. These same groups may, and often do, find themselves opposed to one another on a different issue at a later time.

The fact that our society was to be a pluralistic one, with each group therein interested mainly in serving its own "interests," was foreseen by John Adams 180 years ago. He considered the ethic of self-interest to be a loss of "integrity" and warned that in such a society it is only laws and their institutions which offer the hope of freedom for "minorities" of the moment from the "majority" of the moment. *See* J. HOWE, JR., THE CHANGING POLITICAL THOUGHT OF JOHN ADAMS 160 *passim* (1966). As Justice Mosk implies above, the fourteenth amendment was enacted to serve precisely the function of preservation and protection that Adams saw as necessary in a society such as ours.

those sympathetic to them to represent their interests adequately, then they may be disadvantaged by any piece of legislation, but they have lost their claim to political impotence.

Anyone who views the civil rights acts starting in 1964 and running to date[18] must believe that Third World people and those sympathetic to them have lost their political impotence. The United States Supreme Court made Congress a more effective avenue for redress of Third World grievances by its interpretation of section five of the fourteenth amendment permitting Congress to initiate ways to legislate equality under the law.[19] Indeed, Congress is in a unique position to pass legislation authorizing the kind of admissions program that is challenged in *Bakke*.[20] Furthermore, given its history of legislative enactment requiring affirmative action, it seems quite possible that Congress will take that initiative.[21]

Even accepting the necessity of applying the *Carolene Products* analysis equally to majoritarian and minority racial concerns, the historical reason for strict scrutiny (as opposed to ordinary scrutiny) no longer seems relevant. Under a rational relationship test,[22] it appears to the authors in this symposium and to me that the Davis Medical School program

18. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 437 (codified at 42 U.S.C. §§ 1973b, 1973c, 1973aa to 1973bb-4 (1970)); The Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified in part at 18 U.S.C. § 245, 42 U.S.C. §§ 3601-31 (1970)); The Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1971, 1973 to 1973p (1970)); The Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1447(d), 42 U.S.C. §§ 1971, 1975a to 1975d, 2000a to 2000h-6 (1970)).

19. United States v. Guest, 383 U.S. 745 (1966).

20. *See, e.g.*, The Civil Rights Act of 1964 (Title VII—Equal Employment Opportunity), Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. §§ 2000e to 2000e-15 (1970)).

21. Another measure of the political power of Third World groups is the often repeated claim that the black vote was instrumental in electing Jimmy Carter to the presidency. The fact that Carter received 92% of the black vote in one of the closest presidential races ever is not only domestically, but internationally, given great weight in speculating on the Carter administration's future policies. For example, in a report from South Africa it was stated:

> Many South Africans say they see the handwriting on the wall.
>
> They are convinced that Carter, because of the heavy election support he received from blacks in America, will exert strong political and economic pressure on the South African Government to ease its policy of strict racial separation . . . .

U.S. NEWS & WORLD REPORT, Jan. 31, 1977, at 32.

22. Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1973) [hereinafter cited as Gunther].

would escape constitutional censure.

To drive home the meaning of racial discrimination, I annually tell an apocryphal story to my Constitutional Law class. In it, a southern school chief is summoned to court to explain why all black school children are still attending black schools. He says that he attempted to comply with the federal mandate to desegreate by giving all school children a form on which they could request a transfer and asked only that they list their reason. While a large number of black school children did apply for transfer they all listed as their reason that they wanted to go to white schools. Consequently, he pointed out, he could transfer none of them because he knew that he was not constitutionally permitted to transfer students on account of race. I wonder whether the *Bakke* decision does not, in large part, adopt the logic of that school chief.

One interesting facet of the *Bakke* litigation concerns the courts hearing the case. The decision is the first decision by the supreme court of any state barring affirmative action in school admission. Yet it comes from a court generally considered to be among the most liberal in the country. The absolute standard which it applies (strict scrutiny) comes from another court (the United States Supreme Court in Chief Justice Warren's time) which contributed most of the precedents for strict scrutiny.[23] It will be heard (if it is heard on the merits) by the present Supreme Court which, under Chief Justice Burger, has been reluctant to apply equal protection with the same vigor.[24] The Burger Court has refused to apply strict scrutiny standards and has held, in cases that would appear to call for strict scrutiny, that rational relationship suffices to condemn the practice in question.[25] They have developed new doctrines, such as the doctrine of irrebutable presumption, to avoid equal protection inquiries entirely. Some commentators have found, in the issue-selective manner in which the Burger Court has approached constitutional law, a return to a substantive due process approach.[26] Curiously, a substantive due process approach (or in any event one less wedded to doctrinal consistency)

23. *Id. See also* Justice Harlan's dissent in Shapiro v. Thompson, 394 U.S. 618, 655 (1969).

24. Gunther, *supra* note 22.

25. *Id. See also* Frontiero v. Richardson, 411 U.S. 677 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972); Reed v. Reed, 404 U.S. 71 (1971).

26. *See, e.g.*, Justice Stewart's concurring opinion and Justice Rehnquist's dissenting opinion in Roe v. Wade, 410 U.S. 113, 167, 171 (1973), and Justice White's dissenting opinion in Doe v. Bolton, 410 U.S. 179, 221 (1973).

would seem to militate strongly for a reversal of the decision in *Bakke*.

Since *Bakke* presents a state system that is far less outrageous (to say the least) than the system of enforced segregation reviewed in many of the prior cases, the Burger Court seems in a better position than was the Warren Court to act in favor of the affirmative action program at Davis. While it appears unlikely that the Court would review and approve the special admissions program at Davis, it is within the realm of possibility that the Court would decide that the program should be judged by a standard more permissive than strict scrutiny.[27] Once announcing that the test which the California court applied was the wrong one, the United States Supreme Court would then be in a position to reverse and remand the case. Freed of the necessity of applying the compelling state interest test, the Supreme Court of California might very well reverse itself.[28]

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27. Gunther, *supra* note 22.

28. *See* Justice Tobriner's dissenting opinion in Bakke v. Regents of the University of California, 18 Cal. 3d 34, 64, 553 P.2d 1152, 1172, 132 Cal. Rptr. 680, 700 (1976).